

SUMMARY OF FINAL DECISIONS ISSUED BY THE TRADEMARK TRIAL AND APPEAL BOARD
August 22-26, 2005

Date Issued	Type of Case(1)	Proceeding or Appn. No.	Party or Parties	TTAB Panel(2)	Issue	TTAB Decision	Opposer's or Petitioner's Mark and Goods or Services	Applicant's or Respondent's Mark and Goods or Services	Mark and Goods Cited by Examining Attorney	Examining Attorney	Citable as Precedent of TTAB
8-23	EX	76562723	Repro-Med Systems, Inc.	Hohein* Chapman Walsh	2(d)	Refusal Affirmed		"DENTAL-EVAC" [portable dental suction pump activated by hand]	"E-VAC" [removable protective tip for dental aspirators]	Fine	No
8-23	EX	76393557	Trakloc International, LLC	Quinn Chapman Bucher*	2(d)	Refusal Reversed		"TRAKLOC" [metal building materials, namely, structural beams and posts for forming walls in residential and commercial structures]	"TRAC-LOC" [flooring system comprising non-metal floor panels and metal or plastic track for mechanically interlocking the floor panels]	Yard	No
8-23	OPP	91156778	Phase Forward Inc. v. Mary Noel Adams	Seeherman Bucher* Grendel	2(d); dilution	Opposition Dismissed	"PHASE FORWARD" and "PHASEFORWARD" (and "PF" design) [both marks for computer software used in the management of clinical trials of pharmaceutical products and medical devices and management of data resulting therefrom]; "PHASEFORWARD" (and design) [clinical data collection in the field of clinical and medical trial management and management services related to human clinical trials]	"PHASE FORWARD" [consultation services in the fields of product management, marketing and business planning]			No

(1) EX=Ex Parte Appeal; OPP=Opposition; CANC=Cancellation; CU=Concurrent Use; (SJ)=Summary Judgment; (MD)=Motion to Dismiss; (MR)=Motion to Reopen; (R)=Request for Reconsideration

(2) *=Opinion Writer; (D)=Dissenting Panel Member

SUMMARY OF FINAL DECISIONS ISSUED BY THE TRADEMARK TRIAL AND APPEAL BOARD
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8-24	EX	76501790	Fits Corporation K.K.	Bucher Drost* Kuhlke	2(d)	Refusal Affirmed		"LOVE PASSPORT" [cosmetics; toiletries, namely, perfumes, cologne, shower gel, body milk, shampoo, and hair rinse]	"PASSPORT" [perfume and cologne]	Pino	No
8-24	OPP	91155603	Chatam International Incorporated v. Indomita Wine, S.A.	Hairston Drost* Walsh	2(d)	Opposition Dismissed	"QUANTUM" [wine]	"QUINTUS" [wine]			No
8-24	EX	76518416	Mana-Tee Concepts USA, LLC	Bucher Drost* Walsh	genericness [whether applicant's mark is registrable on the Supplemental Register]	Refusal Affirmed		"SING-A-LONG" [karaoke players]		Beverly	No
8-24	OPP	91155371	St. Nicholas Music Inc. v. Lolly-Jolly, Inc.	Walters Grendel Kuhlke*	2(d)	Opposition Sustained	"HOLLY JOLLY" [fruit-based snacks]	"LOLLY-JOLLY" [candy]			No
8-24	OPP	91125404	DC Comics v. Pan American Grain Mfg. Co. Inc.	Seeherman Hairston Chapman*	2(d)	Opposition Sustained	"KRYPTONITE" [t-shirts; action figures and accessories therefor; <i>and use as a merchandising mark for food and beverage items, in connection with promotion and licensing of opposer's "SUPERMAN" trademark</i>]	"KRIPTONITA" [prepared alcoholic fruit cocktail]			No

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8-24	EX	76419825	Frank-Lin Distillers Products, Ltd.	Drost* Zervas Kuhlke	2(d)	Refusal Affirmed		"BEYOND VODKA" [vodka]	"BEYOND MERLOT" [wine]	Ellis	No
8-24	EX	76295663	Singapore Airlines Limited	Seeherman* Bucher Grendel	whether the term applicant seeks to register functions as a mark for its recited services	Refusal Affirmed		"SPACEBED" [transportation of passengers by air featuring a business class combination airline seat and bed]		Coward	No
8-26	OPP (R)	91150539	Rivercat Foods, Inc. v. Sacramento River Cats Baseball Club, LLC	Hairston Chapman Grendel*	2(d)	On Opposer's Request for Reconsideration: Prior decision (5-24-05) clarified; Dismissal of opposition stands	"RIVERCAT" [seafood, namely, smoked albacore, smoked sturgeon, chinook salmon, shrimp, lobster, salmon, oysters, clams, caviar, calamari, catfish, escargot, fish fillets and sardines; and deli meats, namely, ham, turkey, bologna, salami, hot dogs, hamburger, sausages, corned beef, chicken, liver, bacon, and deli sliced cheese]	"RIVER CATS" (in stylized design format) [clothing, namely, shirts, tee shirts, polo shirts, knit shirts, golf shirts, jackets, sweat shirts, sweaters, jerseys, v-neck pullovers, hats and visors]			No

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THIS DISPOSITION IS
NOT CITABLE AS
PRECEDENT OF THE
TTAB

Mailed:
August 24, 2005

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Mana-Tee Concepts USA, LLC.

Serial No. 76518416

Myron Amer of Myron Amer, P.C. for Mana-Tee Concepts USA, LLC.

Josette M. Beverly, Trademark Examining Attorney, Law Office 112 (Janice O'Lear, Managing Attorney).

Before Bucher, Drost, and Walsh, Administrative Trademark Judges.

Opinion by Drost, Administrative Trademark Judge:

On May 21, 2003, Mana-Tee Concepts USA, LLC (applicant) applied to register on the Principal Register the mark SING-A-LONG in standard character form for karaoke players in Class 9. The application (Serial No. 76518416) alleges a date of first use and first use in commerce of March 1, 2003.

The examining attorney initially refused registration on the ground that the mark SING-A-LONG is merely

descriptive of applicant's goods. 15 U.S.C. § 1052(e)(1). In its response of November 5, 2003, to the examining attorney's refusal, applicant amended the application to seek registration on the Supplemental Register. After this amendment, the examining attorney refused registration on the ground that the mark was generic for the goods under Section 23 of the Trademark Act. 15 U.S.C. § 1091.

After the refusal was made final, applicant filed a notice of appeal.

In order for a mark to be generic, the Court of Appeals for the Federal Circuit has held that: "The critical issue in genericness cases is whether members of the relevant public primarily use or understand the term sought to be protected to refer to the genus of goods or services in question." H. Marvin Ginn Corp. v. Int'l Association of Fire Chiefs, Inc., 782 F.2d 987, 228 USPQ 528, 530 (Fed. Cir. 1986). Ginn goes on to explain that:

Determining whether a mark is generic therefore involves a two-step inquiry: First, what is the genus of goods or services at issue? Second, is the term sought to be registered or retained on the register understood by the relevant public primarily to refer to that genus of goods or services?

Id.

The examining attorney argues that the "proposed mark SING-A-LONG is used by others to commonly refer to a device

that is designed for sing alongs" (Brief at 5) and that the "sing-a-long feature" refers to "a type of musical device." Brief at 3. We will review the evidence of record (emphasis added) to determine what is the genus of the goods and whether the relevant public would understand the term "Sing-A-Long" to refer to the genus of the goods.

We begin by looking at applicant's specimen. The specimen contains the following statements: "SING-A-LONG & RECORD WITH TWO DETACHABLE MICROPHONES" and "Sing-A-Long & record." The specimens indicate that the karaoke player "includes 4 Cassette tapes - 48 songs!" and "Lyric sheets included." In another place, the specimen also contains the notation "sing-a-long® karaoke" (stylized) and applicant has explained that the use of the registration symbol was inadvertent. Response dated November 5, 2003 at 2. We note that even the use of the letters "TM" would not by itself convert a term that does not function as a trademark into one that does. In re A La Veille Russie Inc., 60 USPQ2d 1895, 1901 (TTAB 2001); In re Caserta, 46 USPQ2d 1088, 1090 (TTAB 1998).

The examining attorney also submitted the following evidence from the Internet.

The "Singing Machine" webpage describes itself as "The Leader in Home Karaoke." Among the products listed on the page are the following:

Care Bears **Sing-Along** Player/Recorder - Sharing is caring and with your own personal Care Bears **sing-along** cassette player/recorder you and your friends can cherish the memories. Record your performance in your **sing-along** recorder and playback your songs for hours of fun. Includes **sing-along** microphone and 48 songs with lyric sheets...

Dual Cassette **Sing-Along** Player/Recorder - Singing Machine's dual cassette **sing-along** player/recorder is what the kids are looking for to be the next shining star.

Sing-Along Cassette Player/Recorder - **Sing-along** to your favorite songs with Singing Machine's cassette player with record functions. Includes **sing-along** microphone and 48 songs with lyric sheets.

Nickelodeon **Sing-Along** Cassette Player - Join Dora, Little Bill and Blue with Singing Machine's **sing-along** cassette player with record functions.

Cassette **Sing-Along** Player/Recorder - Cassette **Sing-Along** Player/Recorder w/ AM/FM Radio.

The website www.bizrate.com contains a category "**Sing Along** Karaoke Equipment" listed under "Musical Instruments >Karaoke Equipment >**Sing Along**." Examples under this listing include:

MTV Karaoke Nick Jr. **Sing-Along** Karaoke

MTV Karaoke Nickelodeon **Sing-Along** Karaoke

Ace Karaoke - Magic **Singalong** Song Chip - Children Songs

Ace Karaoke - Magic **Singalong** Microphone I

The Palos Sports webpage shows a product identified as a "VHS - Video Karaoke Party Machine with **Sing Along** Microphone now with a compact CD Player. **Sing along** with recorded music and tape your performance... Includes prerecorded VHS-video karaoke **sing-a-long** tape and VCR connecting cord."

The examining attorney also submitted excerpts from the NEXIS database that show other uses of the term "sing-a-long."

Aaron's Own to Rent, like many of the major chains, rents VCRs, camcorders, microwaves, air conditioners, sofas, cocktail tables and office furniture. It also rent[s] stoves, refrigerators, vacuums, Nintendo games, radar detectors and **sing-a-long** Karaoke machines.

Houston Chronicle, February 7, 1992.

The toddler: That Fisher-Price **singalong** recorder is great.

Daily Town Talk (Alexandria, LA), November 30, 2001.

Craven was in and out of Kay Bee by 5:05 a.m., with ... a **singalong** cassette recorder in hand.

News & Record (Greensboro, NC), November 24, 2001.

Somehow, even those who cannot carry a tune cannot resist the scrolling words and microphone of the **sing-a-long** device. There are karaoke parlors throughout Orange County...

Orange County Register, May 2, 2000.

The evidence above convinces us that karaoke players are also known as "sing-a-long" karaoke or cassette players. "Sing-A-Long" karaoke players include tapes or CDs of music for participants to use to sing along with the

song. We add that "Karaoke" is defined as a Japanese word meaning "a device that plays instrumental accompaniments for a selection of songs to which the user **sings along** and that records the user's singing with the music." *Merriam-Webster's Collegiate Dictionary* (11th ed. 2003).¹

Therefore, applicant's term emphasizes to purchasers not familiar with the Japanese word that "Karaoke" is a sing-a-long device. "Sing-a-long" is an alternative English generic term that makes clear what a "karaoke" player is.

Next, we look at whether the term is understood by the relevant public to refer to the product included in the genus of the goods. Ginn, 228 USPQ at 530. "Evidence of the public's understanding of the term may be obtained from any competent source, such as purchaser testimony, consumer surveys, listings in dictionaries, trade journals, newspapers, and other publications." In re Merrill Lynch, Fenner and Smith Inc., 828 F.2d 1567, 4 USPQ2d 1141, 1143 (Fed. Cir. 1987). "The critical issue in genericness cases is whether members of the relevant public primarily use or understand the term sought to be protected to refer to the genus of goods or services in question." Ginn, 228 USPQ at

¹ We take judicial notice of this definition. University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co., 213 USPQ 594, 596 (TTAB 1982), aff'd, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

530. In this case, we have evidence that distributors and purchasers would understand the term as referring to a genus of karaoke players. Shoppers at bizrate.com are directed to: "Karaoke Equipment >Sing Along." At the Singing Machine website, purchasers of karaoke-type products would encounter numerous "sing-along" products including a "Care Bears Sing-Along Player/Recorder." This sing-along recorder clearly uses the term generically as it goes on to refer to "your own personal Care Bears sing-along cassette player/recorder," to record "your performance in your sing-along recorder." It includes a "sing-along microphone."

Articles in newspapers indicate that Aaron's Rent to Own rents "sing-a-long Karaoke machines" and that Fischer Price has a "great sing-along recorder." We also add that applicant's own specimens use the term in the same manner: "Sing-A-Long & Record with two Detachable Microphones." Applicant's goods seem similar to the Singing Machines' "Dual Cassette Sing-Along Player/Recorder," which is described as: "This recording studio includes two microphone inputs for duets." The evidence set out above clearly supports the conclusion that purchasers would understand the term "Sing-A-Long" to primarily refer to the genus of the goods.

In response to the examining attorney's evidence and arguments that its mark is generic, applicant maintains (Brief at 1-2) that:

The trademark attorney argues that the term "sing-a-long" is a well-known term used to describe karaoke products and services and, as proof that it is well known, attaches web excerpts, not of the term in issue but of sing-along, which it passes off as a "spelling variation."

It is therefore inarguable on the record that what applicant seeks to register is a "spelling variation" of a non-registrable generic term, but in the conversion from generic to a "spelling variation" thereof, there is thus the modicum of differences necessary to qualify as a source identifier registrable on the Supplemental Register.

In its Reply Brief (p. 1) (emphasis omitted) clarifies this argument as follows:

The Examining Attorney has made of record use of SING-ALONG (seven times at page 4, paragraphs 3, 4 and 5); use of SING-A-LONG (one at page 5, last paragraph); SINGALONG (once at page 6, middle paragraph); and SINGALONG (once at page 7, top paragraph).

Thus, the single use of SING-A-LONG is outnumbered 7 to 1 by SING-ALONG and 2 to 1 by SINGALONG.

In response to applicant's arguments, we note, as set out above, that applicant admits that the underlying term "sing-along" is "a non-registrable generic term" and that applicant is seeking to register a "spelling variation" of that term. However, even misspellings of generic terms have been held to be generic. See Nupla Corp. v. IXL Manufacturing Co., 114 F.3d 191, 42 USPQ2d 1711, 1716 (Fed.

Cir. 1997) ("Based on overwhelming documentary evidence of record showing widespread and long-time prior use of the CUSHION-GRIP mark in the hand tool industry, we agree with the district court's conclusion that there is no genuine issue of material fact that Nupla's mark [CUSH-N-GRIP], which is merely a misspelling of CUSHION-GRIP, is also generic as a matter of law, and the registrations are therefore invalid"); In re Yardney Electric Corp., 145 USPQ 404, 405 (TTAB 1965) ("'NICEL' is merely a misspelling and phonetic equivalent of 'nickel' and means the same thing. As such the subject matter identifies applicant's product as to kind and not source. It is therefore not registrable within the purview of the statute") (citation omitted).

Second, the evidence demonstrates that there are several accepted alternative spellings such as "sing along" and even "singalong," and applicant's spelling "sing-a-long" is equally generic. Applicant's spelling is no different than using the alternative spellings "judgment" or "judgement."

Third, the evidence shows that the exact term "sing-a-long" is used in the evidence. See Houston Chronicle, February 7, 1992 ("sing-a-long Karaoke machines"); and Orange County Register, May 2, 2000 ("the sing-a-long device"). Indeed, the spelling variations are found in the

same advertisements. See Palos Sports webpage, "VHS-Video Karaoke Party Machine with Sing Along Microphone" and "VHS-video karaoke sing-a-long tape."

Therefore, applicant's chosen spelling is just as generic as the other spellings.

The record clearly shows that the English term "sing-a-long" is used in association with the Japanese term "karaoke" to inform purchasers what karaoke means in English and that karaoke players are "sing-a-long" devices. Furthermore, the evidence shows that purchasers or users of karaoke players would recognize that the term refers to the genus of the goods. Therefore, applicant's mark SING-A-LONG for karaoke players is generic.

Decision: The refusal to register is affirmed.

THIS DISPOSITION IS
NOT CITABLE AS
PRECEDENT OF THE TTAB

Mailed:
August 24, 2005

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Chatam International Incorporated
v.
Indomita Wine, S.A.

Opposition No. 91155603
to application Serial No. 76416324

Paul M. Lewis of Charles Jacquin et Cie., Inc. for Chatam International Incorporated.

Thomas P. Philbrick of Allmark Trademark Service for Indomita Wine, S.A.¹

Before Hairston, Drost, and Walsh, Administrative Trademark Judges.

Opinion by Drost, Administrative Trademark Judge:

On June 3, 2002, Indomita Wine, S.A. (applicant) filed an intent-to-use application (Serial No. 76416324) to register the mark QUINTUS in standard character form on the Principal Register for "wine" in Class 33.

On February 27, 2003, Chatam International Incorporated (opposer) filed an opposition to the registration of applicant's mark. Opposer alleges that it is the owner of a

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registration (No. 2,684,008) for the mark QUANTUM in standard character form for "wine" in Class 33.² Opposer alleges that based "on the similarities in the marks and the related nature of the goods in issue, as well as the likely overlap in the channels of trade, the public is likely to be confused, mistaken or deceived as to the origin and sponsorship of Applicant's proposed goods to be marketed under Applicant's applied for 'QUINTUS' trademark..." Notice of Opposition at 3. Applicant denied the salient allegations of the notice of opposition.

The Record

The record consists of the following items: the pleadings; the file of the involved application; the trial testimony deposition of Alan M. Perlman, opposer's linguist, with accompanying exhibits; and a Notice of Reliance containing status and title copies of opposer's registration.

Priority

Priority is not an issue here to the extent that opposer relies on its ownership of a federal registration for the mark QUANTUM. See King Candy Co. v. Eunice King's Kitchen, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

¹ Applicant did not file a brief in this proceeding.

² The registration issued February 4, 2003 and it is based on an application filed March 31, 1999.

Likelihood of Confusion

When the issue is likelihood of confusion, we analyze the facts of the case under the factors set out in In re Majestic Distilling Co., 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). See also Recot, Inc. v. Becton, 214 F.3d 1322, 54 USPQ2d 1894, 1896 (Fed. Cir. 2000); In re E.I. du Pont de Nemours & Co., 476 F.2d 1357, 1361, 177 USPQ 563, 567 (CCPA 1973). Opposer, as plaintiff in the opposition proceeding, bears the burden of proving, by a preponderance of the evidence, its asserted ground of likelihood of confusion. See Cerveceria Centroamericana, S.A. v. Cerveceria India Inc., 892 F.2d 1021, 13 USPQ2d 1307, 1309 (Fed. Cir. 1989); Cunningham v. Laser Golf Corp., 222 F.3d 943, 55 USPQ2d 1842, 1848 (Fed. Cir. 2000).

Two important factors that we consider in likelihood of confusion cases are the ones concerning the similarity of the marks and the relatedness of the goods. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976). We look first at the goods. Here, both applicant's and opposer's goods are identified simply as "wine." Inasmuch as we must compare the goods as they are described in the application and the registration to determine if there is a likelihood of confusion, there is no question but that the goods are identical. Canadian Imperial Bank v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d

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1813, 1815 (Fed. Cir. 1987). We add two other points concerning identical goods. First, if the involved marks are used on identical goods, there is a greater likelihood that when similar marks are used in this situation, confusion would be likely. Century 21 Real Estate Corp. v. Century Life of America, 970 F.2d 874, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992) ("When marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines"). Second, because the goods are identical, we must assume that they travel through the same channels of trade and that the potential purchasers are the same. Schieffelin & Co. v. Molson Companies Ltd., 9 USPQ2d 2069, 2073 (TTAB 1989) ("[M]oreover, since there are no restrictions with respect to channels of trade in either applicant's application or opposer's registrations, we must assume that the respective products travel in all normal channels of trade for those alcoholic beverages").

The next factor requires us to compare the parties' marks as to the "similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation, and commercial impression." Majestic Distilling, 65 USPQ2d at 1203. It is well settled that it is improper to dissect a mark and that marks must be viewed in their entireties. In re Shell Oil Co., 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed.

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Cir. 1993). However, more or less weight may be given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entireties. Indeed, this type of analysis appears to be unavoidable." In re National Data Corp., 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

Applicant's mark is the word QUINTUS and opposer's mark is the word QUANTUM. Since both marks are displayed in typed or standard character form, there is no difference concerning the display of the marks. Regarding the appearance of the marks, opposer argues as follows:

Each of the marks "Quantum" and "Quintus" begin with the letter combination "QU," which is by itself an unusual combination of letters, immediately being eye-catching... Both terms have a vowel after the "QU", followed by "NT", followed by a vowel and, in the case of "Quantum", an "M" and, in the case of "QUINTUS", an "S."

Brief at 3-4 (Citations to record omitted).

We agree that there are similarities with the appearance of the marks to the extent that the marks have certain letters in common. Both do begin with the letters "QU." However, we are not persuaded that this is "eye catching."³ "Q" is one of the letters of the western

³ Despite the claim by opposer's linguist that its mark is "eye catching," it submitted numerous examples of registered marks for wine that begin with "Qu," e.g., QUINSON, QUINTA DO CASTELINHO, QUAIL HILL VINEYARD, QUINTET, and QUIERO. Opposer introduced this evidence during the linguist's testimony in the form of a trademark search report, which is normally not appropriate. Weyerhaeuser Co. v. Katz, 24 USPQ 1230, 1231 (TTAB 1992) (A

alphabet, and it almost always requires the letter "U" as the letter following the letter "Q."⁴

When we look at the appearance of the marks as a whole, it is clear that the marks are both seven letter words that begin with the letters "QU" and have the letters "NTU" in the middle. However, they are different to the extent that their initial vowel, the third letter, is a different vowel and the final letter is different. Thus, while there are similarities with the appearance of the marks, there are also differences.

Regarding the pronunciation of the marks, opposer argues (Brief at 4, citations to the record omitted):

They have almost the same phonetic structure; they have the same sequence of vowels and consonants with many sounds in common. Thus, five of the seven sounds in "QUINTUS" are identical to five of the seven sounds in "QUANTUM." Finally and equally important, both "QUANTUM" and "QUINTUS" have the same morphemic structure. A morpheme is a minimal meaningful unit.

"trademark search report is not credible evidence of the existence of the registrations listed in the report"). However, third-party registrations may be used as a form of dictionary to demonstrate that a portion of a mark is suggestive or descriptive. In re J.M. Originals Inc., 6 USPQ2d 1393, 1394 (TTAB 1987). These registrations, used as a dictionary, would also indicate that the "Qu" term is not unusual. Inasmuch as opposer has submitted this registration search report and applicant has not objected, they are a form of admission of opposer that undercuts its witness' testimony about the "eye-catching" nature of the "QU" portion of its mark.

⁴ "When adopted from the Etruscans, the Latin alphabet contained three symbols for the k-sound (See C, K), and the use of Q was limited to representing the sound (k) when it was labialized and followed in spelling by U, a practice maintained today with only rare exceptions." *The Random House Dictionary of the English Language (unabridged)* (2d ed. 1987) 1576. We take judicial notice of this dictionary information. University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co., 213 USPQ 594, 596 (TTAB 1982), aff'd, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

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In both cases, there is a morphemic root, "QUANT" in one case, "QUINT" in the other, and a morphemic suffix "UM" in the one case, and "US" in the other.

Again, there are some similarities and differences between the pronunciations of the marks. Ultimately, we conclude that when the marks are pronounced, the marks would not sound very similar and that there would be noticeable differences between QUANTUM and QUINTUS. The differences between the initial vowels and the last letter create marks that would have significantly different pronunciations.

Next, we look at the meanings of the marks. Opposer has submitted dictionary definitions of both terms (Perlman Ex. 6). Quantum is defined as "Quantity, Amount." There are separate definitions for "Quantum Mechanics" and "Quantum Theory." "Quintus" is defined as the "fifth voice or part in medieval music." On the surface, both marks have different meaning although we question whether many prospective purchasers would be aware of the dictionary definition of "quintus." Applicant's witness asserts that the terms "would be two-syllable words that are Latin sounding or at least foreign sounding." Perlman dep. at 28. However, "quantum" is a recognized word in English but the term "quintus" is more likely to be viewed as a Latin sounding word. The term "quint" is defined as an abbreviation of "fifth," (Perlman Ex. 6) and prospective purchasers may associate the term "fifth" with applicant's

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mark. Therefore, the meanings of the marks would not be similar.

Another point of comparison is the commercial impressions of the marks QUANTUM and QUINTUS. It is likely that purchasers would view opposer's mark as the recognized English word "Quantum." Applicant's mark "Quintus" is an unusual term that would likely create the impression of either an arbitrary term with no established meaning or a term with a Roman or Latin connotation. Neither term would have any connection with the wine. We conclude that the marks' commercial impressions would not be similar.

When we compare the marks QUANTUM and QUINTUS, they would appear somewhat similar in appearance inasmuch as only two of the seven letters differ. Nevertheless, those two different letters significantly change the pronunciation of the marks and their meanings would not be the same. Their commercial impressions would likewise be different. When we consider the differences, we cannot hold that the marks are similar. We are mindful that a "[s]ide by side comparison is not the test," Grandpa Pigeon's of Missouri, Inc. v. Borgsmiller, 477 F.2d 586, 177 USPQ 573, 574 (CCPA 1973), and that "[h]uman memories even of discriminating purchasers ... are not infallible." In re Research and Trading Corp., 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986), quoting, Carlisle Chemical Works, Inc. v. Hardman & Holden Ltd., 434

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F.2d 1403, 168 USPQ 110, 112 (CCPA 1970). However, we cannot conclude that the term "Qu" is so unusual that customers will attribute all identical products with these initial letters to the same source. Nor is it likely that customers will associate the recognized English word QUANTUM with the unusual term QUINTUS. The difference between the middle and ending of the words results in substantially different marks.

Regarding the other factors on the issue of likelihood of confusion, we add that there is no evidence that opposer's mark is famous nor is there evidence of actual confusion. Inasmuch as applicant's mark is based on an intent to use the mark, the lack of actual confusion is hardly surprising and neither this factor nor the fame factor favors either party. There is also no evidence that potential purchasers of wine are careful or sophisticated purchasers and the board has held that wine purchasers are not necessarily sophisticated purchasers. In re Opus One Inc., 60 USPQ2d 1812, 1817 (TTAB 2001). None of the other factors in this case is significant.

One other point we add concerns opposer's linguistic expert. Opposer's witness testified on the ultimate question of likelihood of confusion. We do not give the witness' testimony much weight on this subject for several reasons. First, the witness did not submit evidence that he

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was an expert, or even familiar with, the marketing of wines. Other than his linguistic studies, the witness pointed "to nothing in that experience that provided him with expertise in determining the likelihood of confusion in the purchase of similarly named" wine. Betterbox Communications Ltd. V. BB Technologies Inc., 300 F.3d 325, 64 USPQ2d 1120, 1128 (3rd Cir. 2002). Second, the witness' testimony seemed to address the question of the potential for confusion rather than likelihood of confusion. See Perlman dep. at 34 ("So the potential for confusion which is introduced by the linguistic similarities between the two marks would be exacerbated by the context in which they are likely to be seen"); 35 ("The potential for confusion is inherent in the words, and that potential can be exacerbated by the natural conditions under which we perceive language, which tend to distract us and to create the possibility for misinterpretation"). Indeed, the witness agreed that the impressions of the marks were "different but not strikingly so." Perlman dep. at 29. The witness explained (p. 29):

[I]f you wrote those two words down and asked someone to compare them, are they the same word or not, the person would say, "they're not the same word," but that's very different from hearing the word in conversation or against the buzz of background noise.

The testimony apparently concentrated on whether the marks could ever be confused. However, whether there is a possibility of confusion is not the question. Many

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dissimilar marks could be confused in the proper circumstances due to external factors or inattention on the part of listeners. Nevertheless, the question we must consider is whether there is a likelihood of confusion. Bongrain International (American) Corp. v. Delice de France, Inc., 811 F.2d 1479, 1 USPQ2d 1775, 1779 (Fed. Cir. 1987) (The "statute refers to likelihood, not the mere possibility, of confusion"). Ultimately, even if the witness was addressing the appropriate issue, we are not persuaded that there is a likelihood of confusion in this case.

When we consider all the evidence of record, we conclude that while there are some similarities between the marks QUANTUM and QUINTUS, we agree that the differences in pronunciation, appearance, meaning and commercial impression outweigh any similarities in the marks. Therefore, we hold that there is no likelihood of confusion in this case. Kellogg Co. v. Pack'em Enterprises Inc., 951 F.2d 330, 21 USPQ 1142, 1143-44 (Fed. Cir. 1991) (FROOTEE ICE and elephant design is so different from FROOT LOOPS that even if goods were closely related and opposer's mark were famous there was no likelihood of confusion).

Decision: The opposition is dismissed.